.....IN THE.....

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT,

OSWOLD SOMMER,
Plaintiff in Error.
vs.
CARBON HILL COAL COMPANY,
Defendant in Error

No. 412

BRIEF

....OF....

Defendant in Error.

In Error to the Circuit Court of the United States for the District of Washington, Western Division.

JAMES M. ASHTON,
Attorney and Counsel for Defendant in Error.

B. L. ALDRICH, JR., PRINTER, 522 & 522 CALIFORNIA BUILDING, TACOMA.

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Brief of Defendant in Error.

The Defendant in Error controverts the statement of this case as set forth in the brief of Plaintiff in Error, and respectfully submits the following as a succinct statement of the questions involved in this action, and in the manner in which they are raised:—

STATEMENT OF CASE.

This case is before this court on demurrer to the amended complaint and involves but two questions:

1st. Does the amended complaint state facts sufficient to constitute a cause of action?

2d. Had the Court below jurisdiction of the case?

It did not become necessary for the court below to determine the second question as it decided that it appeared from the face of the complaint that the same did not state a cause of action.

An abstract of the facts stated in the amended complaint is

That defendant in error on June 22nd, 1896, was operating a coal mine in Pierce county, State of Washington. The plaintiff in error was at work as a coal miner in the mine on that date, and had been so working for eight years prior thereto. The mine generated gas, which is not dangerous, provided air and ventilation to the face of the working places is maintained pursuant to the laws of the state, which require 100 cubic feet of air per minute for each person in the mine. This volume of air must be increased if in the opinion of the State Coal Mine Inspector an increase is necessary, and it must be forced to the face of every working place.——See ¶4 of Am. Comp. page 6 of Record.

That defendant in error had in its employ a man named John Lowery who was known as a Fire Boss and who was employed for the purpose of providing the air and overseeing, conducting, guiding and managing the ventilation and in freeing the same from gas.——See ¶5 Am. Comp. p. 6 Record.

That on the above date, plaintiff in error was mining coal at a place known as the Face of Chute Number 2, which chute was 125 feet from the gang-

way and connected with Chute Number 1 by two crosscuts.

That these crosscuts are driven between the Chutes at intervals of about 40 feet.

That the air is forced through the last crosscut or the one nearest the working place to that place; the crosscut next below being closed by the Fire Boss by means of a Canvas Gate across the lower crosscut, which forces the air up the most practicable chute and and through the last crosscut to the working place clearing it of gas and the smoke which is made by the miners in blasting or shooting the coal..——See ¶6 Am. Comp. page 7 Record.

That plaintiff in error before his injury noticed that gas was accumulating where he was working because of insufficient ventilation, and this was because Lowery left an opening in this Canvas Gate through which the air was escaping without reaching the place where Sommer was at work, and because the crosscuts were driven 40 feet apart when they should have been not over 30 feet.

That Sommer went and complained to Lowery about the ventilation, and then returned to his work, believing Lowery would fix the gate, that Lowery failed to do so, and Sommer, in firing a shot in this place, without seeing that Lowery had done as requested, and without his promise to do so was injured by the gas exploding.——See ¶7, Comp., pages 8 and 9 of Record.

That the injury was because defendant in error

did not supply enough air at the place of injury to keep it clear of gas. That plaintiff was in good health; careful and cautious in dangerous places while mining for several years in this mine. That he has been damaged in the sum of $50,000. To this state of facts the defendant in error demurred, raising the two points first above stated, and the demurrer was sustained. —— See pages 12, 13 and 14 of Transcript.

ARGUMENT.

With all due respect to the opposite counsel. I want to say a few words about the extraordinary proceeding of MANUFACTURING ALLEGED FACTS for this court entirely outside of those in the complaint in question. I refer to the Map which has been boldly embodied in the brief of plaintiff in error. Were it properly there, it should not be considered, because it is grossly misleading and inaccurate in every particular, except in those which opposing counsel apparently wish to press into the case in any event. Such a map forms no part of the record in this court or elsewhere, and should, under every principle of practice, be disregarded and STRICKEN FROM THE FILES OF THIS COURT. It is not prepared to any scale. The length and width of passage ways and all other features of this part of the mine are not apparent nor can they be ascertained. The entire mine and surroundings of the LOCUS IN QUO are not shown. The ventilating appliances, volume of air, and the methods adopted by defendant in error in ventilating the mine must be left to conjecture. The map is not proven or authenticated in any manner.

nor can it be, as it forms no part of the complaint in question, and in fact has no existence except as a result of the unfair desires of counsel.

Coming now to the facts in the Amended Complaint and the real questions at issue;—Is it not clear that this Complaint upon its face shows two facts either or both being an absolute bar to plaintiff's recovery? viz.——

1. That Lowry and plaintiff were fellow servants.

2. That plaintiff prior to the injury was guilty of the grossest kind of CONTRIBUTORY NEGLIGENCE.

Taking these points in their order and assuming as must be done, but solely for the purposes of this argument that every allegation in the amended complaint is true, we find that at the time in question, Lowery was or should have been attending to this canvas curtain. That in regulating it he turned up one corner of it same as we would fold up a corner of a window shade, and that he turned it up too far, or was negligent in turning it up at all. The latest doctrine settled now by the highest courts in the land, is that the CHARACTER OF THE ACT AT THE TIME IN QUESTION is the decisive point fixing the relation of joint workers as to whether their STATUS was that of fellow-servants or otherwise. If the act be one which ordinarily must be performed by the master himself, then it matters not to whom he delegates its performance, that other is a vice-principal, and his act, if negligent, will make the master liable, it matters not what the

rank, authority, power or duties of the delegated party may be. Until the last year or two many courts, not excepting the supreme court of the United States, have been floundering in a sea of uncertainty on this fellow-servant doctrine. They have finally settled as the law what was decided by the Court of Appeals of the state of New York in 1880, in the case of Crispin & Babbitt, 81 N. Y., page 516.

The attention of the court is specially directed to this case, as it was there much more difficult to apply the true rule than in the Case at Bar. In the New York case, the party who directly caused the injury by carelessly letting on steam was the Superintendent of the Master, while in this case the man in a mine, who is known as a Fire Boss is as much a miner as a rope-rider, mule-driver, engineer, pump-tender, or any other underground workman, because his acts in guiding and watching the air, assuming (which is not the case) for this argument, that such was his duty, cannot be more than the acts of any other workman in the mines. One workman mines the coal, another guides or pushes the car in to him, another drives a mule or attends the rope cable, another attends to the pumps and keeps the water out so the miners will not drown, and another attends to the brattice cloth and cloth curtains to guide the air so the miners will not be killed with smoke or gas. Where is there is any difference? The business is extra-hazardous. The duties of one are known to the other, they are of daily, almost constant performance. Are not the risks assumed? Was such not a risk assumed beyond doubt

in this case at bar, where the complaint states that Mr. Sommer had been employed in this mine for EIGHT YEARS NEXT BEFORE THE ACCIDENT, and was considered A CAREFUL AND CAUTIOUS MINER? He knew his surroundings, tools and appliances well, and well knew the duties of those of his co-employees who manipulated those appliances.

The statement in the complaint that Lowery was "a vice-principal and not a fellow servant" does not make him one. That is the mere conclusion of the pleader. We might with the same degree of legal force and reason call a mule driver a mule boss or the engineer an engine boss and thus conclude he was a vice-principal.

In all the books there can be found but one line of duty in whicha fire boss in a coal mine figures as a vice-principal and the decisions differ on that point and that is when he makes his rounds pursuant to law early in the morning and before the miners go to work for the purpose of seeing whether or not there is standing gas in the working places or elsewhere in dangerous quantities. The leading case upon this question is: Redstone Coke Co. vs. Roby 8 Atlantic Reporter, page 593.

This is a decision of a very able court—the Supreme Court of Pennsylvania—and the court whose decisions are given great weight in these coal mine cases, as that court has for years been carefully considering and adjudicating cases of this character, on account of the large number of coal mines being oper-

ated in that state.

This decision is in principal ON ALL FOURS WITH THE CASE AT BAR, and almost so in fact. There Roby the miner was injured by his lamp igniting the "black damp" (which is the same as the gas in this case) that had accumulated where he was working because the "Mining Boss" (which is the term sometimes used in Pennsylvania, and corresponding with "Fire Boss" in Washington) had not regularly examined the mine and had not measured or kept account of the air currents. The court assuming such facts to be true said they "only prove the mining boss to have been negligent, of which fact the miners themselves had ample means of knowledge, while the owners had none," [see page 595 of decision]. On page 594 the court says—"Where the mine owners have exercised reasonable care in the selection of a competent mining boss, they are not liable for injuries resulting from his negligence. HIS CO-EMPLOYEES TAKE THE RISK OF HIS NEGLIGENCE PRECISELY AS IN OTHER CASES. If he is incompetent or careless, they can at once discover it, and notify the superintendent; while the owners, with every wish to protect the miners, have no such opportunities of information." This case also holds, as does the case of Crispin v. Babbitt SUPRA that these questions of fellow-servant, his negligence, and the assumption of that risk by the injured party, ARE QUESTIONS OF LAW FOR THE COURT TO DECIDE AND NOT OF FACT TO BE SUBMITTED TO THE JURY.

The attention of the court is particularly directed to this case of Redstone Coke Co. vs. Roby and

the cases therein cited:—The cases of Reese vs. Biddle, 112 Pa St 3 Atlantic Rep. page 813, Waddell vs. Simoson, 112 Pa St 4 Atlantic Rep page 725 are in every way in point.

These Pennsylvania cases are all considered in the light of the statutory laws of that state.——See Public Laws of Pennsylvania p 58, Act of April 18, 1877, which are similar in their purpose and effect as the laws of Washington cited and quoted in this complaint in question.——See Laws of Washington 1891, pages 152 to 163, both inclusive; or the same act found at page 773 of Vol. 1 of Hill's Statutes and Codes of Washington.

Here it should be mentioned that the AMENDED COMPLAINT DOES NOT SHOW A VIOLATION OF THESE STATUTES IN ANY MANNER by the defendant in error.

Paragraph 4 of the complaint simply quotes a a portion of the statute, paragraph 9, says the accident "was caused by the carelessness of the defendant in not having provided and maintained the proper circulation of air." There is no allegation that it did not have on hand and in operation proper machinery and appliances for that purpose. Giving the plaintiff in error the benefit of the only inference to be drawn from these allegations, we must conclude that the "carelessness of the defendant" was the carelessness of Lowery in leaving the curtain turned up, and the authorities are clear that this was the carelessness of a fellow servant, and that his careless act was one of the "assumed risks."

This is particularly true when we construe ¶s4 and 9 of the complaint in the light of the other allegations therein and such is the rule of construction—See Estee's Pleadings and Forms Vol. 1. (2nd edition) page 136, sec. 138 and cases there cited; Boone's Code Pleading [edition of 1885] page 511 and cases there cited.

If defendant in error had violated the statute in any manner, would not the State Inspector have long before this accident so ascertained and disciplined or prosecuted the defendant in error pursuant to his statutory powers.——See the statutes relating to the operation of coal mines in State of Washington SUPRA, and had he done so the amended complaint would certainly so allege.

Before leaving the argument on this point as to whether or not plaintiff and Lowery were fellow servants, and the plaintiff assuming the risks of Lowery's negligence at the curtain, I beg to call the attention of the court to the following recent State and Federal cases, all of which so decide, viz :—Jackson v. Norfolk and W. R. Co., 27, South Eastern Reporter, p. 278; Frawley v. Sheldon, 38, Atlantic Rep., p. 370; Moore Lime Co., v. Richardson's Adm' X 28, South Eastern, p. 334; Morgan v. Carbon Hill Coal Co., 34, Pacific Reporter, p. 152; Vol. 6, Washington Reports, p. 577; Schroeder v. Flint & P. M. R. Co., 61, North Western Rep. p. 663; Morch v. Toledo S. & M. Ry. Co., 71, North Western, p. 464.

The whole question is worked out and settled by the following decisions of the Supreme Court of the United States:—Northern Pacific R. R. Co. v. Hambly 154, U. S., p. 349; Central Railroad Co., v. Keegan, 160, U. S., p. 259; Northern Pacific R. R. Co., v. Chorlass, 162, U. S., p. 359; Northern Pacific R. R. Co., v. Peterson, 162, U. S., p. 346; Martin v. Atchinson, T. & Santa Fee R. R. Co., 166, U. S., p. 399; Northern Pacific R. R. v. Poirier, 167, U. S., p. 48.

I desire to urge that the case of Jackson v. Norfolk & W. R. Co., SUPRA, is worthy of the most careful examination by this court. A reading of the same will give the court a complete, comprehensive, and exhaustive view of a case the same in principle as this. The decision is by one of the strongest state courts, the Supreme Court of Appeals of West Virginia. It reviews these questions, PRO and CON, in all their bearings upon this case at bar, and arrays and analyzes the decisions of the Supreme Court of the United States, which I have cited last above.

The doctrine in the leading and latest text books, such as Brach on Contributory Negligence and Bailey's work on the Master's Liability for Injury to Servant is also judicially considered in this West Virginia case, and I respectfully request this court to read and give its usual careful consideration to the same, when I maintain that the facts and law in that case will, in reason and justice, be found to be applicable to this. Where is there any legal difference in the act of a

conductor negligently signalling, and backing a car against a brakeman, and a fire-boss negligently raising a curtain so as to permit gas to accumulate and injure a miner. The coal company here could not watch every act of this fire-boss in connection with his duties. A law requiring that of an employer would be a crying injustice.

The duties of this fire-boss, at the time in question, involved—and could only involve—acts incident to the conduct and operation of the business of mining coal. There is not a syllable in the complaint to the effect that defendant in error did not exercise reasonable care and prudence in the employment of Lowery.

It is not even alleged that he was incompetent, or that the Company knew him to be incompetent. For all that appears in the complaint the defendant in error surrounded the plaintiff with a fit and careful fire-boss, and his functions in the matter of managing, conducting and guiding the air by means of this curtain or otherwise, were purely and clearly those of mere operation. He was not in another or separate department as referred to by the Supreme Court in case of R. R. v. Peterson, SUPRA, and his act was purely that of a co-worker. These unfortunate and distressing accidents are, it seems, necessarily of frequent occurrence in coal mining, the business being extra-hazardous, more so than railroading. The place where Mr. Sommer was hurt, was originally made safe and constantly kept so by his employer as far as it

was possible to do so, considering the dangers and hazards of the business. The fact that the cross-cuts were 40 instead of 30 feet apart is not charged in the complaint as the cause of the accident, and even were it so the plaintiff in error, according to the complaint, had for a long time previous to his injury (and without complaint from him) been familiar with the location and character of these cross-cuts, and it will be conceded as elementary and settled that he assumed the risks incident to their construction or operation. But aside from this, there can be no presumption that the cross-cuts were negligently located or driven, because they were placed there under and subject to the inspection of a State Coal Mine Inspector, provided for by the very act mentioned in the complaint. Again, the court's attention is directed to the only law of Washington which exists or ever has existed on this subject of cross-cuts, and that law provides that these cross-cuts shall not be over SIXTY feet apart.——SEE SECTION 5 OF THE "ACT FOR THE PROTECTION OF PERSONS WORKING IN COAL MINES."

Laws of Washington, 1897, page 60.

From all that appears in the complaint, the brattice, curtain and all air appliances were "reasonably safe and suitable." The whole trouble seems to have been in the manipulating of these appliances by a fellow workman.

Passing to the cases of Frawley vs. Sheldon and Moore Lime Co. vs Richardson SUPRA, the reasons for these decisions will be found in point.

There can be no difference in priciple in a foreman carelessly letting a hook drop and injuring a workman or a foreman carelessly moving lime cars so they injure a fellow workman from a fire-boss negligently raising a curtain in a mine or lowering it, thereby injuring a miner.

Take the case of a switchman on a railroad and a section hand or a member of the train crew.

The switchman fails to close the switch. A section hand working on the track, or one of the crew of the train is injured in the wreck of a train resulting therefrom:—Would any person contend that the switchman was not a fellow servant of the employee injured? Still the switchman manages and regulates the switch by means of the switch bar; and in this case, the fire boss manages and regulates the air by means of a curtain.

Counsel contend that His Honor, Judge Hanford predicated his decision on the case of

Morgan vs. Carbon Hill Coal Co. SUPRA.

In this they are in error. That case was but one of the decisions bearing upon the Rules of Law which controled the judgment of the court below.

This Court in reading the decision of the Supreme Court of the State of Washington in the Morgan case, will find that the only reasonable conclusion to be drawn from the second paragraph thereof is a finding of the Court that a fire-boss

is not a vice-principal. The case of

Sayward vs. Carlson 23 Pac. Rep. p. 830

and referred to in the Morgan case will be found in point with our contention in this case.

Counsel for plaintiff in error at pages 26 and 27 of their brief make an unfair and inaccurate application of the Morgan case, because the court in that case not only held that the fire-boss at the time of accident was not a vice-principal, but the court at page 579, vol. 6, Washington reports, squarely states that Jones, the fire-boss, "HAD, BY VIRTUE OF HIS EMPLOYMENT NO RIGHT TO CONTROL THE ACTION OF THE MINERS IN THE PROSECUTION OF THEIR WORK." The court then states what the only powers of a fire-boss were, and shows clearly its inclination not to assume that a fire-boss is a vice-principal.

Assuming, purely for the sake of argument, that the court below did follow the Morgan case, and aside from the point as to whether questions of this kind are those of local law or otherwise, was His Honor, Judge Hanford not right in giving great weight to the views of the highest court in the state where the case was instituted and pending? Such is the settled practice and a well established custom in the Federal Courts,——See Packer v. Whittier, 81, Federal Rep., p. 335, and many cases there cited.

In all of the cases cited above, both Federal and State, it will be found that the negligent party occu-

pied a relation of employment to the injured person superior to that existing between a fire-boss and a miner.

Yet we find the doctrine for which we here contend, recently but finally settled by such of our ablest state courts as have had these questions before them (as they are now at bar) and by the Supreme Court of the United States in favor of and in strict accord with the decision upon the facts shown by this amended complaint, as rendered by the court below.

SECOND.

We come now to the second question arising under the first ground of the demurrer, viz :—That the facts stated in this amended complaint show the plaintiff in error was negligent, and that his negligence contributed to his injury. It is, indeed, a most serious question if it was not the direct cause of the accident.

In cases of this kind counsel should be absolutely fair, and if he can, consistently with his duty to his client, he should be liberal. I will endeavor to be so. What does the amended complaint tell us that the plaintiff did? After stating that he was a miner working for this defendant, and at this mine, for EIGHT YEARS PRIOR TO AND INCLUDING a date, which was the date of the accident [see 2nd, 5th, 6th and 7th paragraphs.], he in the 3rd paragraph tells us what he knows about the mine and its dangers.

It is evident that he must have gained this knowledge when working there, as he tells us in the same paragraph about the accumulations of gas, its tendency, and how its dangers can be avoided by proper ventilation on the part of the company, and in the 4th paragraph tells us what the statute requires in the way of air; but the pleading no where informs the Court that the air was not there, and the methods of ventilation as required by law, or that it was not maintained EXCEPT BY AND ON ACCOUNT OF THE ACTS OF LOWERY, because it is apparent from the complaint that if Lowery had not been negligent with

the curtain the air would have passed through the cross-cuts all right.

In the 5th paragraph the plaintiff, through his pleader makes Lowery the provider, overseer, conductor, guider and manager of the ventilation.

The pleader strives hard to make him a vice-principal and there closes the paragraph with a conclusion of law to the effect that he was such, while all the pleadable facts in the complaint show otherwise.

In the 6th paragraph he tells what he was doing, and describes the passage-ways in the mine, their method of construction, how the air is forced through them, and shows the use of the canvas gate.

In the 7th paragraph plaintiff informs the court just where he was working at the time of the accident, and states squarely that HE NOTICED GAS ACCUMULATING there. Then, in substance and fact, that it so accumulated because Lowery did not manipulate the canvas gate right, and thereby let a great volume of air pass away, so it did not reach his working place which thereby had an insufficient amount, and because the cross-cuts should only have been 30 feet apart.

Now, what did plaintiff do? Continuing in this 7th paragraph does he not state and show that soon AFTER NOTICING the gas he complained to Lowery and NOTIFIED HIM OF THE CAUSE, viz., the opening in the gate, and requested Lowery to furnish more air. That Lowery neglected to do so, and allowed the

gas to accumulate. That plaintiff THOUGHT and BELIEVED he had freed the place of gas, and then what do we find plaintiff doing, without looking, testing, inquiring or taking any precautions to see if Lowery had done so, and apparently without waiting for him to do so, but IN THE REGULAR COURSE OF HIS DUTY he proceeds to the place and LIGHTS A MATCH for the purpose of SETTING OFF A CHARGE OF GIANT POWDER. Could there be a stronger or clearer case of contributory negligence revealed by any pleading?

In the first place

THE PLEADING FAILS TO ALLEGE ANY PROMISE ON THE PART OF THE EMPLOYER TO CLOSE THE CANVAS GATE OR OTHERWISE REMOVE THE GAS EITHER THROUGH LOWERY OR OTHERWISE.

It has long been well established law, that it is negligence on the part of an

EMPLOYEE AFTER KNOWING OF DANGER, TO RETURN TO THE POINT OF DANGER, WITHOUT NOT ONLY A PROMISE BY OR ON THE PART OF THE EMPLOYER TO REMOVE THE DANGER, BUT THE EMPLOYEE MUST WAIT A REASONABLE LENGTH OF TIME TO PERMIT OF THAT BEING DONE, AND UNLESS HE ALLEGES OR PROVES THAT THE EMPLOYER INFORMED HIM THAT IT WAS DONE, HE MUST FURTHER WHEN RETURNING EXERCISE SUCH CARE AND PRUDENCE AS A REASONABLY PRUDENT MAN WOULD ORDINARILY EXERCISE UNDER THE CIRCUMSTANCES TO SEE THAT THE DANGERS OR DEFECTS, AS THE CASE MAY BE, HAVE BEEN REMOVED OR

CURED.

Did the plaintiff in error do this? Does not the complaint expressly show that he did not? Does it not show that he did just the reverse?

Instead of applying the general rule and construing the pleading against the pleader, let us give him the benefit of every doubt and say that he did wait a reasonable time before returning if he ever went far enough away to be out of the gas. The fact remains that he did not secure Lowery's promise to remedy the ventilation, NOR DOES THE COMPLAINT ALLEGE THAT SUCH A PROMISE WAS GIVEN BY LOWERY OR OTHERWISE. THIS IN ITSELF MAKES IT IMPOSSIBLE FOR THE COURT TO DO OTHERWISE THAN SUSTAIN THE DEMURRER.

The complaint does not allege that plaintiff in error took any precautions when returning. Nor does it allege that the dangers appeared to be removed.

IF PLAINTIFF COULD [as he says he did] DISCOVER THE GAS BEFORE GOING TO LOWERY, COULD HE NOT DISCOVER IT AFTER RETURNING AND BEFORE LIGHTING A MATCH TO FIRE A BLAST? *THAT IS SELF-EVIDENT.*

The Morgan case SUPRA, is in point on this question of contributory negligence, also the well considered case of JACKSON V. NORFOLK & W. R. CO., SUPRA.

And see

Stiles v. Richardson, et al., 46, Pacific Reporter, p. 694,

And the case of

Blankenship v. Galveston Ry. Co., 38, South Western Repr., p. 216.

The court is requested to read the text of this case, as there the question arose on a demurrer to the complaint, the plaintiff refusing to amend same as here.

See :

Muss v Rafsnyder 35 Atlantic Rep p 9 58.
Toohey v Equitable Gas Co. 36 Atlantic Rep p 314
Central Law Journal No. 5 Vol. 46 p 79

and the comments there made on the recent case of Illinois Steel Co's vs. Mann, decided by the Supreme Court of Illinois——See case of Burns v Windfall Manufacturing Co. 45 North Eastern Rep's p 188.

The Court is requested to read each of the above cases, as they will be found in point and give much assistance in arriving at a just conclusion in this case.

The most recent Federal cases, showing facts similar or deciding questions which, in principle and law, are the same as the case at bar, are:

Texas & P. Ry. Co. v. Rodgers,
decided by the Circuit Court of Appeals
for the Fifth Circuit, June 27th, 1893,
57 Federal Reports 378

In the case of Northern Pacific R. R. v. Charless this Court decided that a servant cannot recover against his master, when he was not in the exercise of due care at the time of the accident, even if the injury was caused through the negligence of the master, and the Supreme Court of the United States in reviewing the Charless case [see that case in Supreme Court cited SUPRA] did not disturb the doctrine so established by this court and could not rightfully do so because it is the law.

See :

Vol. 7, U. S. App. (9th Cir.) p. 359, or
51, Federal Rep., p. 562,

And in my judgment this court would never have been reversed in the Charless case if the Supreme Court had not fallen into error in the case of

R. R. Co. vs. Ross, 112 U. S., p. 377.

The case of

Hough vs. Railway Co., 100 U. S., p. 214

Establishes clearly that this complaint does not state a cause of action. The plaintiff in error had no right to return to work without some promise by his employer, or some one acting as the employer's ALTER EGO that the ventilation would be set right. Plaintiff

assumed all risk arising from the cross-cuts AS HE KNEW, because the complaint shows that in the very nature of things HE MUST HAVE KNOWN that it was a physical impossibility for defendant in error to remove or change the cross-cuts, at least, not within any reasonable length of time.

Under the doctrine established by the case of

Tuttle v. Detroit G. H. & M. Ry., 122, U. S., p. 189,

It would seem that it must be determined that the plaintiff has to bear the consequences of all results arising from the facts which he alleges.

The court's special attention is directed to

The case of

Bunt vs. Sierra Butte Gold Mining Co., 138, U. S., p. 483,

It is almost on all fours with this case at bar, and it is so in principle. In the Bunt case the Supreme Court of the United States affirmed the decision of the Circuit Court for this circuit, which found Bunt clearly guilty of contributory negligence in sitting down right in and beneath the place of danger, after a post had been removed which supported the roof that fell upon him when so sitting. The Supreme Court said "Recklessness could hardly go farther," and that "he took the risks of the work in which he was employed, and that his negligence in the course of that work was the direct cause of his death." The Supreme

Court then cites several well-known cases theretofore decided by it any or all of which might be applied here.

Where is there any substantial legal difference between the Bunt case, and the plaintiff in error here turning back in this same gas chamber, knowing that it was dangerous with gas, and without taking any care (but BELIEVING which the law says he should not have done without a promise and reasonable time for for its fulfillment) to protect himself, and lighting a match to blast. Had he performed almost any other act at that time and place, his conduct would not appear so grossly negligent and reckless.

The case of Stiles vs. Richie SUPRA is a case of an accident in a mine, it is much in point, and there the question was on the Sufficiency of the Complaint.

Your Honors will observe that there the promise is alleged, and still the complaint held insufficient, if so, then A FORTIORI what must be the result when the promise is not alleged, and not even any facts from which it could be presumed, were such presumption permissible in the construction of pleadings.

Before concluding permit me to review, as briefly as possible, the argument of counsel for plaintiff in error.

No one will dispute the rules of law as quoted in Brief of plaintiff in error from the decisions there found, but counsel seem to go astray in the application of those rules. If there ever was a case in which "all

reasonable men will draw the same conclusion and find that (upon the facts in this complaint) there can be no recovery;" it is this case at bar. I trust the court will not be misled by the Statutes of the State, which counsel apparently dwell upon in their brief. It will be observed that it is no where properly alleged nor alleged in any way, except possibly as a conclusion of the pleader (see P. 9, of Comp.) that defendant in error violated the statutes, and did not have in circulation to and at this working place at the time, 100 cubic feet of air for each person in the mine, nor does the complaint tell us WHAT THE AIR MEASURED AT THE FOOT OF THE DOWNCAST, at or before the time of accident. I do not think the court will permit counsel to mislead by this flourish of statutory law, without alleging some facts showing a violation of such law. Again, supposing gas blew out at this place in such quantities that 100 cubic feet for each person in the mine, going by this point each minute would not remove the same. Would defendant in error be liable? Certainly not, because it had taken every reesonable precaution and had the amount of air the law required. Indeed it would have been many times more, because the statute only requires that the volume of air where it passes the foot of the down cast [i. e., where it turns to go back and out of the mine] should be sufficient to give 100 feet to each workman, and this air is split up and taken off in numerous directions by a number of these curtain gates throughout the mine, which gates must necessarily be, and are turned up to a small extent, or to a

great extent, or kept closed, as the case may be, to turn or split the air, and it follows as a self-evident fact that this manipulating of these "air switches" MUST NECESSARILY BE DONE BY THE MINERS THEMSELVES, were it reasonable to suppose that a fire-boss is a vice-principal? It is apparent that he was not so at this time, as it would be physically impossible for him to be in all places where these curtains were at the same time, or to manipulate them in any.

Again, no living soul can tell how they should be manipulated except the miner himself, and this is self-evident.

For fear of getting outside the record, I will cease this line of argument, WHICH IS TRUE: and in a case put before the court like this the court should be INFORMED OF THE FACTS but I should not do so were opposing counsel disposed to be fair in the make-up of their brief, or had they abstained from creating addenda to their complaint by means of a map, etc.

The abstract principles of law quoted by counsel at pages 9 to 17 of their brief will not be disputed by any lawyer, but if counsel will apply the law as molded by the ENTIRE DECISION from which they quote, they will find it fatal to their contentions.

Take the JARVI CASE, as reported in 53 Fed. p 65., which seems to be their strongest case, or at least the one up which they rely with the greatest force. No one will seriously controvert the position that the

facts there showed a case of doubt which could only be lawfully determined by submitting them to a jury. The facts there showed that Jarvi "did not apprehend the risk and danger".——See p 71 of opinion.

He did not know of the dangerous rock. At page 70 of opinion we find he was inexperienced with roofs, and had no means of examining the roof from which the rock fell. Are not those facts the opposite from this case at bar. Here the complaint shows clearly that Mr. Sommer DID APPREHEND the risk and danger. HE DID KNOW ABOUT THE GAS, because he complained of it before he was hurt.

He went into it again without knowing, or taking steps to ascertain that it had been removed; and in his pleading he does not state a single fact which gave him the right to "think," or "believe," or RELY UPON his request to Lowery being complied with.

No one can read Judge Sanborn's statement of the facts, nor his opinion in the Jarvi case, and earnestly say it should be applied adversely to the decision of the court below in this case. The law, as settled in the Jarvi case, can be applied however with terrific effect in this case.

See the last paragraph on page 68 of that decision, where the court says "that the servant cannot recklessly expose himself to a known danger, OR TO A DANGER WHICH AN ORDINARILY PRUDENT AND INTELLIGENT MAN would, IN HIS SITUATION, have apprehended and then recover of the master for an injury his own

recklessness caused," citing many strong cases.

Again, at page 69 of the Jarvi opinion, that a miner has no right to rely on his place of work being safe when the facts are such that a reasonably prudent and intelligent man would apprehend danger. Judge Sanborn further decides, at page 70, that the question of contributory negligence is one for the court, "when the facts are undisputed, and are such that reasonable men can fairly draw but one conclusion from them," and many strong cases are cited to sustain this rule.

These are all principles for which we seriously contend and ask to have applied in this case.

What good would it do plaintiff in error to go to trial? His proof would have to be within his allegations. The result eventually would surely be to make his recovery impossible. The only effect in such cases is to encourage and prolong the unfortunate claimant in the hope that he may recover.

The NORMAN CASE, cited at page 17 of plaintiff's brief, is purely a case of an employer NOT FURNISHING A REASONABLY SAFE place to work. It will be apparent that such is not this case.

Let us now consider the case of

Gowen v. Bush (76 Fed., p. 349),

which, in my opinion, is entitled to more consideration than any case in the brief of plaintiff in error.

It is somewhat unfortunate that this decision does not inform us whether Murphy or Scarrett was a fire-boss, but to be liberal with plaintiff and give him the best of the argument on that point, we will assume that they were; although it should be remembered that, in all these cases, there is an "inside" or "underground-boss," or "foreman," who is over and above a fire-boss, and that above him again is a "General Foreman," who works both out, and inside, and above him again a Superintendent or Manager or both.

The case of Gowen v. Bush simply decides what we have heretofore substantially conceded to be the law, that Murphy and Scarrett, when making their rounds of the mine, either early in the morning —when it is generally done—or from time to time, were discharging a personal duty of the master. THERE IS NOT A WORD IN THE COMPLAINT AT BAR CHARGING LOWERY OR ANY ONE WITH NEGLIGENCE IN THIS RESPECT. WE LOOK IN VAIN THROUGH THIS COMPLAINT FOR ANY ALLEGATION THAT THIS MINE WAS NOT PROPERLY INSPECTED ON THE MORNING OF THE ACCIDENT, OR FROM TIME TO TIME ON THAT DAY.

Were it there, it would not help matters much, considering the knowledge and actions of plaintiff in error, as pleaded therein.

Applying the Gowan v. Bush case to the facts shown by the complaint, does it not decide that if Mr. Sommer was a CAREFUL AND CAUTIOUS MINER, FAMILIAR FOR EIGHT YEARS WITH THIS MINE, KNEW OF

ITS DANGERS FROM GAS, BOTH DURING THIS TIME AND PARTICULARLY WHEN HE WAS INJURED, he cannot recover? Does not the complaint at bar EXPRESSLY SHOW all these facts?

Further, it is not charged that anyone misled plaintiff by telling him there was no gas where he was working, or THAT IT HAD BEEN REMOVED, or THAT IT WOULD BE REMOVED.

We respectfully request the Court to consider carefully pages 350 and 351 of the Gowen v Bush decision and then apply them to the facts in this complaint.

The case of:

McPeck v Central Vt. R. R. Co. 79 Federal Rep p 590

has a bearing upon many features of this case at bar, and the attention of the court is directed thereto.

Counsel for plaintiff at page 25 of their brief state: "plaintiff in error had a right to depend on that duty—meaning Lowery's duty at the gate—being performed; he had a right to believe it was "performed."

Now I respectfully contend that such IS NOT THE LAW.

I challenge counsel to produce a single text-book or a single case, where such is held to be the law upon the facts shown by the complaint at bar.

The law on the contrary is that

HE HAD, AND HAS NO RIGHT TO SO DEPEND AND SO BE-

LIEVE WITHOUT PROVING AND ALLEGING IN HIS COMPLAINT SOME PROMISE, OR SOME ACT, STATEMENT OR CONDUCT, ON THE PART OF THE MASTER, OR SOME ONE, AN ALTER EGO FOR THE MASTER TO THAT EFFECT, AND BEFORE HE RETURNED TO WORK.

I am willing to submit this statement of the law to the judgment of any court.

ALL OF THE CASES CITED SUPRA, SUSTAIN THIS RULE.

Were it proper I might concede adversely to defendant in error every other point in this case; and this sole point that the complaint fails to allege any fact bringing the case within the law as stated is sufficient to sustain and, in fact, left the court below with no alternative except to sustain the demurrer. This court, speaking through His Honor, Judge Ross has decided the points for which we contend. I refer to the case of

Bunker Hill & S. Mining & C. Co., v. Schmelling, 79, Federal Rep., p. 263.

The Schmelling case sustains our contention that where the dangers arise right along during the prosecution of mining and under circumstances whereby the employer in the nature of things cannot constantly keep informed "at every moment of the work," he is not obliged to keep the place safe from dangers arising every moment, when the miner is working there.——[See the instruction at page 265, which met with the approval of this court.]

It also sustains our wiews on assumption of risks,

and that the CHARACTER OF THE ACT is what determines the status of the negligent party.——See

Page 266 and 267 of the decision in the Federal Reports in the Schmelling case.

From personal experience I know cases of this kind generally appeal involuntarily to the sympathetic nature. Courts and counsel have to set aside sentiment to be firm and apply the law. The most unfortunate feature of these cases is that the unfortunate, when injured, generally rush off and sue the employer for an extraordinary sum as in this case, instead of giving the employer an opportunity to aid the unfortunate, which all employers should do, either before or after suit and upon principles of humanitarianism, were they given the opportunity.

In conclusion: There are no fact or facts in this complaint which, IN THEIR LEGAL EFFECT, state that

1. Defendant in Error did not provide plaintiff with a reasonably safe place to work, and one as safe as the circumstances would permit, or

2. That it was negligent in employing, or in surrounding him with an incompetent or negligent fellow workman; or

3 That the appliances, as furnished, and in operation, were not reasonably safe and suitable.

The complaint is insufficient and the judgment sustaining the demurrer thereto should be affirmed.

JAMES M. ASHTON,
Attorney and Counsel for Defendant in Error.